



Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Interconnection and Resale Obligations)	CC Docket No. 94-54
Pertaining to Commercial Mobile Radio)	
Services)	
)	
Forbearance from Applying Provisions of the)	WT Docket No. 98-100
Telecommunications Act to Wireless)	
Telecommunications Carriers)	

To: The Commission

OPPOSITION OF U S WEST WIRELESS, LLC

Pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), U S WEST Wireless, LLC ("U S WEST") hereby files comments in opposition to the Petition for Further Reconsideration ("Petition") filed by MCI WORLDCOM, Inc. ("MCI WorldCom") requesting reconsideration of the Commission's *Memorandum Opinion and Order on Reconsideration* in the above-referenced proceeding.¹ As discussed herein, the Commission should deny MCI WorldCom's Petition on both procedural and substantive grounds.

¹ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 96-54, *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, *Forbearance from Applying Provisions of the Telecommunications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Services*, GN Docket No. 94-33, *Memorandum Opinion and Order on Reconsideration*, FCC 99-250 (rel. Sept. 27, 1999), 64 Fed. Reg. 61022 (Nov. 9, 1999) ("*Reconsideration Order*").

BACKGROUND/INTRODUCTION

Section 20.12(b) of the Commission's rules provides that until November 24, 2002, cellular and certain broadband PCS licensees "shall not restrict the resale of its services, including enhanced services, unless the carrier demonstrates that the restriction is reasonable."² In the *First Report and Order* adopting this "sunset" date for the resale obligation, the Commission stated that it did *not* believe "that a resale rule is appropriate for all markets at all times" and acknowledged that under certain conditions "the costs of a resale rule might outweigh the benefits, and that resale restrictions in a particular market would not necessarily be unjust and unreasonable in violation of the Act or the public interest."³ The Commission thus concluded that the resale requirement "should be narrowly tailored to apply . . . only for so long as competitive conditions continue to render application of the resale rule necessary."⁴

Against this backdrop, the Commission determined "that the competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector" and a sunset date was thus established of November 24, 2002. The sunset requirement was affirmed in mid-1998,⁵ and again in the *Reconsideration Order*.⁶ In the *Reconsideration Order*, the Commission determined that "new entry is continuing to occur and that

² 47 C.F.R. § 20.12(b).

³ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order*, 11 FCC Rcd. 18455, 18463 ¶ 14 (1996).

⁴ *Id.*

⁵ WT Docket No. 98-100, GN Docket No. 94-33, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 16857, 16876 ¶ 38 (1998).

⁶ *Reconsideration Order* ¶ 21.

competition, in general, is gradually increasing in the mobile telephony market.”⁷ The Commission further determined that opponents of the sunset provisions “fail[ed] to present any new facts or arguments to persuade us that the decision to sunset the resale rule . . . should be revised in any way” and rejected arguments that the sunset rule violates the Communications Act and Commission precedent, as well as arguments that the Commission exceeded its discretion in adopting the rule.⁸

The sunset requirement was also upheld by the United States Court of Appeals for the Sixth Circuit.⁹ Adopting the sunset requirement, the *Cellnet* court determined, was well within the Commission’s discretion to adopt rules based on its predictive judgment regarding conditions in the CMRS marketplace.¹⁰ The Commission in the *Reconsideration Order* rejected virtually identical arguments as those made by resellers before the court.¹¹ Finally, the Commission determined that CMRS carriers’ resale obligations should not extend to CPE, finding no evidence of cross-subsidization of CPE with service revenues, and no evidence that resellers were unable to obtain CPE at economic prices.¹²

MCI WorldCom seeks reconsideration of the Commission’s decision to affirm the sunset of the resale requirement, and to exclude CPE from carriers’ resale obligations.¹³ By its Petition, MCI WorldCom attempts to incorporate into this proceeding arguments it has made regarding at least

⁷ *Id.* ¶ 11.

⁸ *Id.* ¶ 21.

⁹ *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998).

¹⁰ *Id.* at 441-42.

¹¹ *Reconsideration Order* ¶ 21; see National Wireless Resellers Ass’n, Petition for Reconsideration in CC Docket No. 94-54, filed Aug. 23, 1996.

¹² *Reconsideration Order* ¶ 29.

¹³ MCI WORLDCOM, Inc., Petition for Reconsideration in WT Docket No. 98-100 and CC Docket No. 94-54, filed Dec. 9, 1999.

three unrelated proceedings -- number portability, number resource optimization, and enhanced 911 ("E-911"). For the reasons discussed herein, the Commission should reject MCI WorldCom's arguments on procedural and substantive grounds. More fundamentally, the Commission should heed the oft-stated policy that the Communications Act's intent -- and that of the Commission in implementing the Act -- is to protect competition, not competitors.¹⁴

DISCUSSION

I. MCI WORLDCOM HAS FAILED TO PRESENT ANY VALID ARGUMENTS WARRANTING EXTENSION OF THE SUNSET DATE

MCI WorldCom asserts that the Commission should "extend the mandatory resale rule sunset date from November 24, 2002 to November 24, 2003 at the earliest, or to . . . at least one full year after the successful conclusion of wireless local number portability (LNP) implementation."¹⁵ Apparently, MCI WorldCom does not question the rationale underlying the Commission's decision to sunset the resale requirement because under either of its proposals, the resale requirement would eventually be eliminated. Rather, it has improperly attempted to "bootstrap" arguments it has unsuccessfully made in other pending proceedings in a transparent attempt to extend the availability to resellers of the bargaining leverage to which they would not otherwise be entitled as a matter of law. The Commission should therefore deny the Petition.

A. The Petition is Procedurally Infirm

MCI WorldCom asserts that "[w]ithout LNP, any wireless carrier choosing to terminate its resale arrangements could potentially strand wireless resale customers" and that such customers "will need to change their telephone number -- at great inconvenience in order to continue

¹⁴ See *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Co., Memorandum Opinion and Order*, 12 FCC Rcd. 22280, ¶ 16 (1997) (citing *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1491-92 (D.C. Cir. 1995)).

¹⁵ Petition at 1.

service.”¹⁶ MCI WorldCom, however, already petitioned the Commission to reconsider its decision extending the wireless LNP deadline to November 24, 2002 and requested “that the Commission place substantive reporting requirements on wireless providers.”¹⁷ The Commission recently rejected MCI WorldCom’s arguments and denied its wireless LNP petition.¹⁸ To the extent that MCI WorldCom questions the merits of the *LNP Forbearance Order*, the arguments raised in its Petition are untimely and moot.¹⁹ MCI WorldCom’s Petition is therefore procedurally infirm and, to the extent that its arguments relating to wireless LNP warrant consideration (which they do not) the Commission should consider them resolved in the context of the previously filed petition.²⁰

B. CMRS Competition Supports the Sunset of the CMRS Resale Requirement

To the extent that MCI WorldCom does address the merits of the *Reconsideration Order*, its arguments fail substantively. Extending the sunset date will not benefit CMRS customers. Rather, it will merely extend the period during which resellers are entitled to special regulatory treatment.

¹⁶ *Id.* at 2.

¹⁷ MCI WorldCom, Inc., Petition for Reconsideration, WT Docket No. 98-229 and CC Docket No. 95-116, filed May 27, 1999, at 2, 3-6 (“wireless LNP petition”). In its wireless LNP petition, MCI WorldCom also speculated that calling party pays requirements and number resource optimization efforts would warrant an earlier wireless LNP deadline. *Id.* at 2.

¹⁸ *Cellular Telecommunications Industry Association’s Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, Telephone Number Portability, Order on Reconsideration*, WT Docket No. 98-229, CC Docket No. 95-116, FCC 00-47, ¶¶ 6, 14-15, 26 (rel. Feb. 23, 2000) (“*LNP Reconsideration Order*”).

¹⁹ See 47 C.F.R. § 1.429. Furthermore, the CMRS resale “sunset” date was already established when the Commission released the *LNP Forbearance Order*, but MCI WorldCom made no mention of the sunset date in its earlier petition.

²⁰ Moreover, the Commission is separately considering number pooling and number exhaust issues in the context of CC Docket No. 99-300. The issues raised in MCI WorldCom’s Petition in regard to number conservation are already being addressed in that proceeding. *Numbering Resource Optimization, Notice of Proposed Rulemaking*, 14 FCC Rcd. 10322, 10382-99 ¶¶ 130-176 (1999).

The CMRS resale requirement itself was based on the policy of promoting competition in the CMRS marketplace.²¹ Given that competition among cellular, broadband PCS and ESMR providers is only intensifying, the underlying basis for the rule -- that “the benefits to be obtained from a resale rule . . . are most prominent in markets that have not achieved full competition” -- supports elimination of the resale requirement.²² While resale opportunities will continue to exist *after* the sunset of the CMRS resale rule, nowhere did the Commission *guarantee* a reseller the right to exist in perpetuity;²³ as the Sixth Circuit held, the resale policy does not exist “for the purpose of ensuring the availability of resale.”²⁴ MCI WorldCom has presented no evidence that competition in the CMRS marketplace will diminish between now and November 2002; rather, it seeks to “confuse[] the means and ends the FCC had in mind” in adopting the resale rule in the first place.²⁵

Moreover, the concern purportedly underlying the Petition -- undue customer inconvenience -- is not an issue in the competitive CMRS marketplace. The Commission has previously recognized in the CMRS context that a carrier’s discontinuance of service to customers does not raise public interest concerns in a competitive market.²⁶ This policy reflects the simple, common-

²¹ *First Report and Order*, 11 FCC Rcd. at 18462.

²² *See id.*

²³ Indeed, the Telecommunications Resellers Association recently released a Yankee Group study concluding that there will be considerable market-based incentives for facilities-based CMRS carriers to pursue distribution arrangements with resellers. *See Telecommunications Resellers Ass’n, TRA Releases Yankee Group Study on Wireless Resale; Report Predicts Size of Resale Market Will Triple in 5 Years*, Feb. 23, 2000, at <www.tra.org>. Thus, claims suggesting the imminent demise of CMRS resale absent a regulatory mandate seem overstated.

²⁴ *See Cellnet*, 149 F.3d at 441.

²⁵ *See id.*

²⁶ *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, ¶ 182 (1994) (“if adequate substitute services are abundantly available, the discontinuance application is

sense notion that the purported “inconvenience” is mitigated when a customer can readily obtain service from an alternative competing provider.²⁷ This policy is no less applicable under MCI WorldCom’s scenario of a “stranded” reseller customer. A reseller customer, like any facilities-based carrier’s customer, has a number of carriers from which to choose. Thus, a CMRS reseller customer’s “inconvenience,” as described in the MCI WorldCom Petition, clearly does not warrant an extension of the CMRS resale requirement.

Furthermore, the Commission has already effectively rejected MCI WorldCom’s arguments that wireless LNP must precede the sunset of the resale rule in order to protect either a facilities-based CMRS carrier’s or CMRS reseller’s customers. In extending the wireless LNP deadline to November 24, 2002, the Commission determined that “number portability is not a current priority for wireless consumers” and “the high churn rates associated with wireless carriers suggest that the lack of wireless number portability currently is not a barrier to customers switching wireless carriers.”²⁸ The Commission affirmed this decision just days ago.²⁹ Again, given that MCI WorldCom has presented no evidence that competition in the CMRS marketplace will diminish between now and November 2002, its arguments regarding potential inconvenience to wireless resellers’ customers are unsupported.

²⁶ (...continued)

unnecessary to protect consumers” and “[t]his analysis is equally applicable to the CMRS marketplace”).

²⁷ See *id.*; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order*, 85 FCC 2d 1, ¶ 114 (1980) (“customers in a market characterized by competition have access to alternative services should one carrier discontinue service”).

²⁸ *Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations and Telephone Number Portability, Memorandum Opinion and Order*, 14 FCC Rcd. 3092, 3109 ¶ 34 (1999).

²⁹ *LNP Reconsideration Order* ¶ 16.

As the Commission has acknowledged in this proceeding and elsewhere, competition is increasing in the CMRS marketplace.³⁰ Furthermore, additional mobile wireless spectrum is already scheduled for auction later this year, and the Commission has stated its intent to allocate and license additional spectrum for third-generation mobile wireless services.³¹ MCI WorldCom does not -- and cannot -- suggest that there will be additional barriers to customers switching wireless carriers. MCI WorldCom has presented no new arguments warranting an extension of the resale rule; again, it is not reseller customers that MCI WorldCom seeks to protect, but resellers themselves. The Commission should not countenance this effort.

II. CMRS CARRIERS' USE OF HANDSET-BASED E-911 SOLUTIONS DOES NOT WARRANT RE-IMPOSING MANDATORY CPE RESALE

MCI WorldCom asserts that where a facilities-based carrier opts for a handset-based E-911 Phase II solution, manufacturers of compliant handsets "may be pressured to first fill the orders of their larger wireless carrier customers, the facilities-based carriers, and delay in providing enhanced handset solutions to resellers."³² CMRS carriers' E-911 Phase II obligations were separately addressed in a *Third Report and Order* in CC Docket No. 94-102, for which the deadline

³⁰ *Reconsideration Order* ¶ 11; William E. Kennard, Chairman, Address before the National Press Club, "Telecommunications at the Millenium: the Telecom Act at Four," Feb. 8, 2000.

³¹ See Public Notice, *Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000*, DA 00-43 (rel. Jan. 10, 2000); Public Notice, *Auction of C and F Block Broadband PCS Licenses*, DA 00-49 (rel. Jan. 12, 2000); *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, FCC 99-354 (rel. Nov. 22, 1999).

³² Petition at 5.

for filing a petition for reconsideration has long since past.³³ This provision of MCI WorldCom's Petition is also procedurally infirm and should be rejected for this reason alone.

Moreover, virtually identical arguments were made by one of MCI WorldCom's predecessors-in-interest at an earlier stage in this proceeding, yet MCI WorldCom provides no evidence to counter the Commission's rejection of those arguments in the *Reconsideration Order*.³⁴ In essence, MCI WorldCom is attempting to resurrect a myth of carrier primacy over the handset marketplace.³⁵ In the *Reconsideration Order*, the Commission found no evidence "that resellers are prevented from obtaining CPE from sources other than CMRS carriers or from negotiating with equipment manufacturers for discounted prices."³⁶ Indeed, the Commission found that "[s]maller resellers have alternatives to obtain CPE volume discounts comparable to those available to large resellers and facilities-based carriers."³⁷ Further, as to E-911 Phase II-compliant handsets, facilities-based CMRS carriers, like resellers, are dependent on manufacturers for the availability of such handsets; in short, handset availability is not a "reseller" issue. All of these facts directly undermine MCI WorldCom's arguments.

³³ See *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Third Report and Order*, CC Docket No. 94-102, FCC 99-245 (rel. Oct. 6, 1999), 64 Fed. Reg. 60126 (Nov. 4, 1999).

³⁴ MCI Telecommunications Corp., Comments on Petitions for Reconsideration in CC Docket No. 94-54, filed Sept. 27, 1996, at 3-4 (arguing that resellers would have no assurance that they would have any source of supply for CPE in absence of CPE resale requirement).

³⁵ See *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Second Report and Order*, 14 FCC Rcd. 10954, 10990 ¶ 83 (1999).

³⁶ *Reconsideration Order* ¶ 29.

³⁷ *Id.* Indeed, the notion that a reseller with the resources of MCI WorldCom would be at an economic disadvantage vis-a-vis a facilities-based carrier is absurd.

As the Commission concluded, the provision of CPE below cost to attract new customers “is essentially a marketing expense that should be borne independently by resellers and facilities-based carriers alike” and resellers should not be exempt “from an expense borne by facilities-based carriers.”³⁸ MCI WorldCom, however, ignores this sound economic basis for the Commission’s decision. Rather, MCI WorldCom has invoked the policy objectives of the unrelated E-911 proceeding in a transparent attempt to extend the business advantages afforded by the mandatory CPE resale requirement.

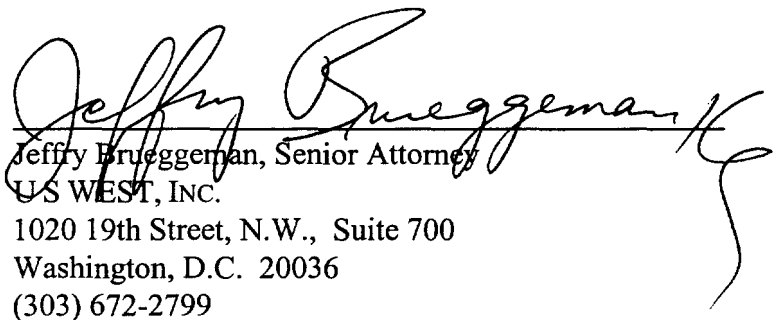
CONCLUSION

For the foregoing reasons, MCI WorldCom’s Petition is procedurally infirm, and it has failed to present any arguments or facts warranting an extension of the CMRS resale requirement or reimposition of the CPE resale obligation. The Petition should be denied.

Respectfully submitted,

U S WEST WIRELESS, LLC

By:


 Jeffrey Brueggeman, Senior Attorney
 U S WEST, INC.
 1020 19th Street, N.W., Suite 700
 Washington, D.C. 20036
 (303) 672-2799

Its Attorney

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³⁸ *Reconsideration Order ¶ 29.*